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A Certain Stillness:

Supreme Court Secrets, Several Kinds

By WALTER R. GORDON

Washington.

The cloak of secrecy that shelters government decisions and their makers is generally as leaky as it is ubiquitous. Members of such recondite organizations as the Central Intelligence Agency or the National Security Council complain often (most notably during last June's airing of the Pentagon papers) that secrecy is more like a sieve than a cloak.

But there is one organization that has never had any trouble keeping its secrets secret: the Supreme Court.

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The Court has been so successful, in fact, that it could vitiate its ultimate source of power, the public confidence in and acceptance of its role as a bedrock of integrity and fidelity to the Constitution. For that confidence and acceptance are based not on blind obeisance to a totem but on an intelligent understanding of how nine justices reconcile Eighteenth Century aphorisms with Twentieth Century realities.

"If we are governed, at least in part, by the Supreme Court," Arthur S. Miller, a George Washington University law professor, wrote recently, "then elementary democratic theory would seem to require that we as citizens are entitled to know not only who governs us but also how they do it."

Professor Miller pointed out that there has never been and probably never could be a legal challenge to the Court's secrecy. "But if we are to have an open government in an open society," he continued, "then the Court (as well as the executive and Congress, too) should no longer be hidden behind a velvet curtain."

Supreme Court secrecy, however, is not unmitigated evil. Former Supreme Court justices, former law clerks and a number of academic observers have all stated their belief that under at least some circumstances secrecy is indispensable to the functioning of the Court.

The problem is to discover when secrecy is a protective cloak shielding the authority and independence of the justices and when it is an obfuscating fog that serves mere personal convenience or that deprives the public of essential information about how it is being governed.

Three areas are generally obscured by secrecy—judicial decision making, the personal lives of the justices and the way the Court goes about its work.

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Justices, with good reason, do not discuss their decisions, what they signify or how they were arrived at. "Their work is to judge, not to comment on the how and why of judging," William D. Rogers, a former Supreme Court law clerk, has written.

"By long and salutary tradition, the Court deems it inappropriate that individual justices descend to the political arena and defend their judgments, or the process through which they are hammered out."

Major decisions of the Court are explained in majority, concurring and dissenting opinions. The decision must stand or fall on the quality of those opinions, not on any ancillary comments justices might make to reporters or lawyers or in any other public way.

And if nine equal and independent men are to work together, confidential discussion is essential. For this reason, the late Justice Hugo L. Black ordered that his notes on such discussions, running to more than 600 volumes, be destroyed after his death.

But the unusual degree of secrecy surrounding the personal lives of the justices is another matter. To pick only one example from among many, it is often a difficult and time-consuming task for a reporter to find out why a justice is absent from court. On one occasion, the only way to find out what illness had stricken Justice Thurgood Marshall was to talk to his wife.

Such personal details not only give important insights into how the nation is governed, but often directly influence the substance of public policy. For example, ever since the Senate rejected the nomination of Justice Abe Fortas for chief justice in 1968, the financial affairs of judges have been a subject of lively interest. Yet disclosure on the part of Supreme Court justices remains far from complete.

To pick another example, justices often remove themselves from cases but almost never explain their reasons for doing so.

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The third area of secrecy is the most crucial for an understanding of the Court. In law as in diplomacy, modalities may be at least as important as substance, the how as important as the what. Yet inexplicably, Supreme Court procedures are buried beneath layers of almost impenetrable secrecy. It is not unusual for the affairs of the nation to be influenced by these procedures.

For example, the Supreme Court will receive about 4,500 petitions this year but agree to hand down formal decisions accompanied by full written opinions in 150 or less. Thus when the Court agrees to hear an important issue, such as capital punishment or wire-tapping it is major news.

But what is the process by which those few issues are winnowed from the mass of petitions? The Court will not say. William H. Rehnquist, who is expected to join the Court later this month, once wrote an article contending that the justices' law clerks play a major role in this process. Do they? No one knows for sure. Careful historical investigators believe they do not, but certainty is lacking.

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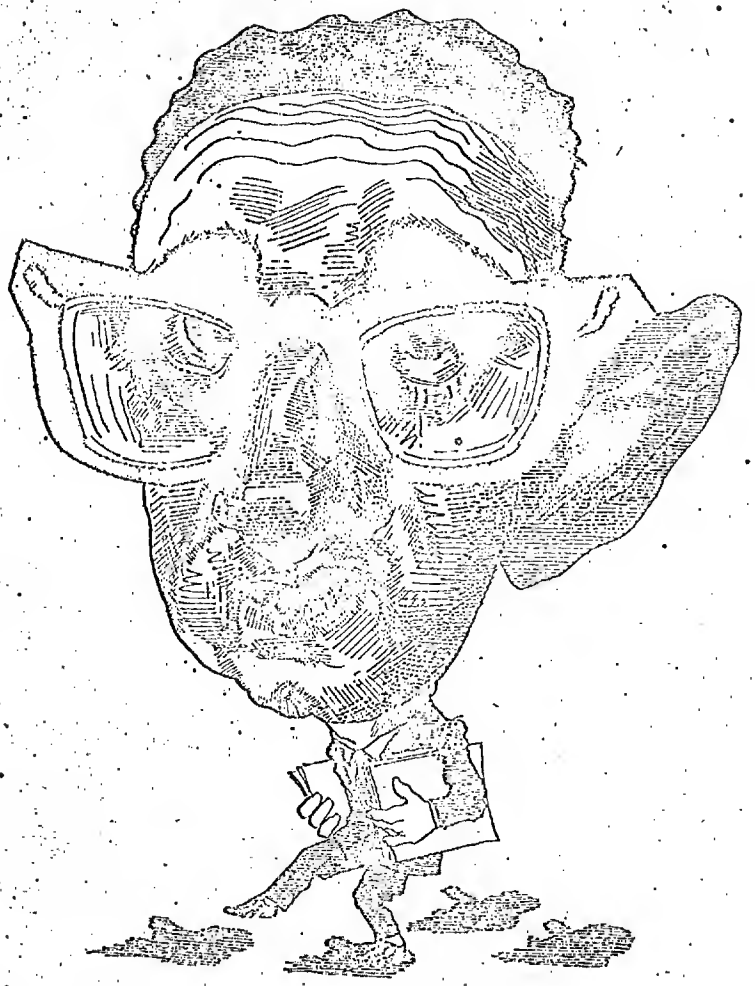
Generally, the Court has required the votes of four justices to accept a case for review. Earlier this year reporters wondered if the rule would be modified in view of the two vacancies on the bench left by the departure of Justice Black and Justice John M. Harlan. But the Court would not say. Eventually Justice William O. Douglas mentioned as an aside in an opinion discussing an application for continuation of bail that the rule had been modified so that the votes of three justices would suffice.

For this reason the Court has been able to decide a number of important issues it might not otherwise have been able to hear. By mid-December there were hints that the court had returned to the traditional rule of four.

It is hard to see how secrecy about such decisions serves any worthwhile purpose. In the long run it could so impede public understanding that the Court would be permanently damaged.



The Rise of Henry Kissinger

"He was a Rococo figure, complex, finely carved, all surface, like an intricately cut prism. His face was delicate but without depth, his conversation brilliant but without ultimate seriousness. Equally at home in the salon and in the Cabinet, he was the beau-ideal of [an] aristocracy which justified itself not by its truth but by its existence. And if he never came to terms with the new age it was not because he failed to understand its seriousness but because he disdained it."

WITH THESE WORDS, A HARVARD thesis-writer named Henry Kissinger introduced Clemens Metternich, Austria's greatest foreign minister and a man whose diplomatic life he has sought to relive. As Richard Nixon's most influential advisor on foreign policy, Kissinger has embodied the role of the 19th century balance-of-power diplomat. He is cunning, elusive, and all-powerful in the sprawling sector of government which seeks to advise the President on national security matters. As Nixon's personal emissary to foreign dignitaries, to academia, and—as "a high White House official"—to the press, he is vague and unpredictable—yet he is the single authoritative carrier of national policy, besides the President himself.

Like the Austrian minister who became his greatest political hero, Kissinger has used his position in government as a protective cloak to conceal his larger ambitions and purposes. Far from being the detached, objective arbiter of presidential decision-making, he has become a crucial molder and supporter of Nixon's foreign policy. Instead of merely holding the bureaucracy at comfortable arm's length, he has entangled it in a web of useless projects and studies, cleverly shifting an important locus of advisory power from the Cabinet departments to his own office. And as a confidential advisor to the President, he never speaks for the record, cannot be made to testify before Congress, and is identified with presidential policy only on a semi-public level. His activity is even less subject to domestic constraints than that of Nixon himself.

Not that any of this is very surprising, however, because Kissinger has emerged from that strain of policy thinking which is fiercely anti-popular and anti-bureaucratic in its origins. Like the ministers who ruled post-Napoleonic Europe from the conference table at Vienna—and the Eastern Establishment figures who preceded him as policy-makers of a later age—Kissinger believes that legislative bodies, bureaucracies, and run-of-the-mill citizenries all lack the training and temperament that are needed in the diplomatic field. He is only slightly less moved by the academics who parade down to Washington to be with the great man and peddle their ideas. And when one sets aside popular opinion, Congress, the bureaucracy, and the academic community, there remains the President alone. The inescapable conclusion is that Henry Kissinger's only meaningful constituency is a constituency of one.

At a superficial level, the comparison with Metternich breaks down. As opposed to a finely carved figure, Kissinger is only of average height, slightly overweight, excessively plain, and somewhat stooped. Far from *beau-ideal*, he is a Jewish refugee, and he speaks with a foreign accent. Despite the image of the gay divorcé, the ruminations about his social activity seem to be grounded more in journalism than in fact.

But without being a butterfly, Kissinger is a deeper individual than the man he wrote about, and he possesses qualities which have attracted him a great deal more popularity in inner circles than his methods or policies would seem to

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by David Landau